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Hearing Date: September 18, 2002
At: 10:00 a.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11	
CEDAR CHEMICAL CORPORATION and VICKSBURG CHEMICAL COMPANY,	Case Nos.	02-11039 (SMB) and 02-11040 (SMB)
Debtors.	Jointly Administered	

LIMITED OBJECTION OF THE DEBTORS TO THE CLAIMS FILED BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (CLAIM NOS. 138, 460 AND 474)

TO THE HONORABLE STUART M. BERNSTEIN,
CHIEF UNITED STATES BANKRUPTCY JUDGE:

Cedar Chemical Corporation ("Cedar") and Vicksburg Chemical Company (individually "Vicksburg," and collectively with Cedar, the "Debtors"), by their attorneys, Angel & Frankel, P.C., herein request the expunging, as duplicative, and/or the reclassifying of the proofs of claim filed by the United States Environmental Protection Agency (the "EPA") and respectfully represent as follows:

INTRODUCTION

1. On March 8, 2002 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under Chapter 11 of Title 11, United States Code (the "Bankruptcy Code") with the United States Bankruptcy Court for the Southern District of New York.

2. No trustee has been appointed in Debtors' cases and the Debtors are operating as debtors-in-possession under sections 1107 and 1108 of the Bankruptcy Code.

3. An official committee of unsecured creditors has been appointed in the Debtors' cases ("Creditors' Committee") and has retained the law firm of Satterlee Stephens Burke & Burke, LLP to represent it.

4. By order dated March 8, 2002, the Debtors' cases are being jointly administered.

5. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (O).

BACKGROUND

6. Cedar was the owner of a chemical manufacturing facility located on a 48 acre site in West Helena, Arkansas (the "Cedar Site" or "Cedar Facility") and Vicksburg was the owner of a chemical fertilizer manufacturing facility (the "Vicksburg Facility") located in Vicksburg, Mississippi. The Vicksburg Facility rested on approximately 100 acres of a 600 acre site (the "Vicksburg Site" and collectively with the Cedar Site, the "Sites").

7. The largest claims against the Debtors consist of the claims of the Debtors' pre-petition lenders (the "Secured Lenders"), who hold liens and security interests against substantially all of the Debtors' assets, including, until they were abandoned, the Cedar Facility and the Vicksburg Facility (collectively, the "Facilities").

8. At or about the time of the commencement of their chapter 11 cases, the Debtors began the process of winding down their operations at both Facilities and embarked upon a program for the sale of their assets for the benefit of their creditors.

9. Environmental impediments at the Facilities, together with the fact that they required modernization, resulted in the Debtors' lack of success in selling the Facilities.

10. Upon motion of the Debtors, after lengthy negotiations among the Debtors, the Creditors' Committee, the EPA, the Arkansas Department of Environmental Quality and the Mississippi Department of Environmental Quality, the Court signed a consensual order authorizing the abandonment of the Facilities by the Debtors effective 11:59 p.m. on October 14, 2002, pursuant to section 554(a) of the Bankruptcy Code.

The EPA Claims

11. The EPA filed a proof of claim dated September 4, 2002 in the amount of $30 million, identified as claim no. 138 on the claims register of the Court ("Claim 138"). Claim 138 has been amended by a proof of claim dated May 23, 2003 in the amount of approximately $31,322,169.98, which claim is listed twice on the claims register of the Court, as claim nos. 460 and 474 (individually, "Claim 460" and "Claim 474"). Claim 460 and Claim 138 are hereinafter collectively referred to as the "EPA Claim". The EPA asserts an administrative priority for the entire EPA Claim.

12. The EPA asserts an estimated $30 million claim in future costs for the continued operation of the wastewater plant and remediation of the Vicksburg Site, and "an additional $572,233.61 [the "Vicksburg Expenditures"] [already incurred] in operating the wastewater treatment facility following the abandonment of the Vicksburg Site in October 2002." Claim 460 at ¶ 4.

13. The EPA also asserts an estimated claim of $648,000 in future costs for the implementation of "a CERCLA removal action at the Cedar Site" and an additional $101,936.37 (the "Cedar Expenditures") for response costs already incurred at the Cedar Site through March 31, 2003. Claim 460 at ¶ 5.

Request for Expunging Duplicative Claims

14. Claim 460 is identical to Claim 474. Accordingly, the Debtors are herein seeking the expunging of claim no. 474, as a duplicative claim.

Request for Reclassification of the EPA Claim

15. This limited objection is also being filed for the purpose of obtaining a determination from the Court that the EPA Claim is a general unsecured claim and not entitled to an administrative priority. The Debtors reserve their rights to object to the amount of the EPA Claim in a later motion.

16. Unlike a general unsecured claim, it is not presumed that administrative expense claims are allowed. In re Fullmer, 962 F.2d 1463, 1467 (10th Cir. 1992). Instead, the burden of proof is upon the claimant and "statutory priorities are narrowly construed." Trustees of the Amalgamated Insurance Fund v. McFarlin's, Inc. 789 F.2d 98, 100 (2nd Cir. 1986).

17. In order to be accorded an administrative priority, a claimant must demonstrate that "(1) the right to payment arose from a postpetition transaction with the debtor estate, rather than a pre-petition transaction with the debtor, and (2) the consideration supporting the right to payment was beneficial to the estate of the debtor." In re Hemingway Transport, Inc., 954 F.2d 1, 5 (1st Cir. 1992).

18. The EPA Claim is totally devoid of any basis for satisfying this test. Moreover, it essentially ignores the fact that the Cedar Facility and Vicksburg Facility have been abandoned.

19. The legal basis for denying the EPA Claim as an administrative priority is set forth in the opinion of the Second Circuit Court of Appeals in In re Chateaugay Corp., 944 F.2d 997 (2nd Cir. 1991). In Chateaugay the Second Circuit affirmed that expenditures by the EPA for environmental remediation are claims dischargeable in bankruptcy. Although the funds might be expended by the claimant in the postpetition period, the claim nevertheless was a pre-petition contingent claim. Id. at 1005. The holding in Chateaugay was summarized by the district court in Big Yank Corp. v. Liberty Mutual Fire Insurance Co., 203 B.R. 537 (S.D.N.Y. 1996), rev'd on other grounds, 139 F.3d 325 (2nd Cir. 1998), as follows:

> The *Chateaugay* case involved claims to recover response costs incurred postpetition by the Environmental Protection Agency ("EPA") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") in cleaning up sites where releases or threatened releases of hazardous materials had occurred prepetition. The Court addressed the question whether such claims, based on prepetition contamination but for recovery of postpetition response cost expenditures, constituted a prepetition claim in bankruptcy. The Court found that the prepetition relationship between the EPA and its regulated entities was sufficient to constitute the requisite level of "pre-petition contact" to make the CERCLA costs prepetition claims, because the parties were "acutely aware" of each other before the bankruptcy petition was filed.

Id. at 541.

20. The Second Circuit recognized in Chateaugay that certain post-petition EPA remedial costs were entitled to an administrative priority. However, the claims asserted by the EPA in the present proceeding do not satisfy the Second Circuit's criteria. In order to satisfy the requirements established in Chateaugay, expenditures by the EPA must have been made (i) to prevent an imminent and identifiable harm to the environment, the standard established in Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494, 507 n. 9, 106 S. Ct. 775, 762 n. 9 (1986), and (ii) at a time during which the property was owned by the debtor. Accord,

In re Dant & Russel, Inc., 853 F.2d 700 (9th Cir. 1988) (no administrative liability under postpetition lease for environmental remediation, where debtor vacated the space).

21. In contrast, the EPA Claim explicitly states that the Vicksburg Expenditures occurred after the abandonment of the Facilities and simply states that the Cedar Expenditures were made during the period through March 31, 2003. It is obvious that neither of these assertions are sufficient to satisfy the requirements set forth in Chateaugay; nor were any benefits provided to the Debtors' estates by the EPA.

22. In contrast, as the Court is aware, in the postpetition period during which the Debtors occupied the Facilities, approximately $6 million (including $1.8 million in severance payments) of the Secured Lenders' cash collateral, not EPA funds, were used to operate the Facilities and otherwise maintain the Sites to prevent any environmental harm.

23. The Debtors request that the Court waive the requirement set forth in LBR 9013-1(b) that any motion filed shall have an accompanying memorandum of law, as the authorities relied upon are set forth herein.

WHEREFORE, it is respectfully requested that (i) the EPA Claim be reclassified as a general unsecured claim without prejudice to the rights of the Debtors to later seek a reduction in the amount of such claim, and (ii) Claim 474 be expunged, as a duplicative claim.

Dated: New York, New York
August 13, 2003

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